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The New United States Claims Court

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ARTICLES

THE NEW UNITED STATES CLAIMS COURT

PHILIP R. MILLER*

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I. THE FEDERAL COURTS IMPROVEMENT ACT OF 1982: INTRODUCTION

Effective October 1, 1982, after a life span of approximately 117 years,¹ the existence of the United States Court of Claims was terminated by the Federal Courts Improvement Act of 1982.² Prior to the passage of the

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¹ Act of Feb. 24, 1855, ch. 122, 10 Stat. 612. See also W. COWEN, R. NICHOLS, JR., & M. BENNETT, *THE UNITED STATES COURT OF CLAIMS, A HISTORY, PART II, ORIGIN—DEVELOPMENT—JURISDICTION, 1855-1978* (reprinted in 216 Ct. Cl. 1).

² Pub. L. No. 97-164, 96 Stat. 25 (1982) (codified throughout sections of titles 2, 5, 7, 10,

Act, the Court of Claims had operated on two levels. Its trial functions had been delegated to a staff of sixteen commissioners³ designated by its rules as trial judges.⁴ The ultimate decision-making power remained with seven judges appointed pursuant to article III of the Constitution.⁵ These seven judges, sitting in panels of three or en banc, issued original decisions in cases which did not require trials, such as those coming up for decision on dispositive motions and on full stipulations. They also decided cases on appeals from the Merit Systems Protection Board and boards of contract appeals. In addition, the commissioners of the Court of Claims, but not the judges, heard cases referred to them by either branch of Congress for the purpose of rendering advisory reports.⁶

The Act turned the purely appellate functions of the Court of Claims over to the new Court of Appeals for the Federal Circuit. It delegated all other tasks to the new United States Claims Court. Unlike commissioners, who had only limited authority to make recommendations, the judges of the new court possess the authority to enter judgments which are final if not appealed.⁷

Initially, the active commissioners of the Court of Claims automatically became judges of the Claims Court for terms expiring September 30, 1986, or fifteen years from their original appointments as commissioners, or upon their reaching age seventy, whichever is the earliest.⁸ New appointments are to be made by the President, with Senate confirmation, for fifteen-year terms. The chief judge is to be designated by the President.⁹ Retirees may be recalled by the chief judge to serve as senior judges in addition to the sixteen active judges.¹⁰

II. JURISDICTION OF THE CLAIMS COURT

The Claims Court has inherited the jurisdiction of the Court of Claims with respect to "claims against the United States generally."¹¹ This authority includes

15, 16, 18, 19, 22, 25, 26, 28, 30, 31, 33, 35, 40, 41, 42, 44, 45 and 50 app. U.S.C. (1982)).

³ 28 U.S.C. § 792 (1976 & Supp. V 1981), *repealed by* Federal Courts Improvement Act, § 121(b), 96 Stat. 25, 34.

⁴ Ct. Cl. R. 13(a) (28 U.S.C. app. (1976)).

⁵ 28 U.S.C. § 171 (1976), *amended by* Federal Courts Improvement Act, § 105(a), 96 Stat. 25, 26-27.

⁶ See *infra* note 29 and accompanying text.

⁷ Federal Courts Improvement Act, § 133(a), 28 U.S.C. § 1491.

⁸ *Id.* § 167(b), 28 U.S.C. § 171 note.

⁹ *Id.* § 105(a), 28 U.S.C. § 171(b).

¹⁰ *Id.* § 121(f)(1), 28 U.S.C. § 797(b). As of August, 1983, six of the sixteen commissioners or judges had retired upon expiration of their fifteen-year terms. The President made six new appointments to replace them and also reappointed two others whose terms had not yet expired to new fifteen-year terms. Three of the retirees have been recalled.

¹¹ *Id.* § 133(a), 28 U.S.C. § 1491.

jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .¹²

This general grant of jurisdiction provides the authority for the most common types of claims formerly brought in the Court of Claims: tax refunds, contract adjustments and breaches, military and civilian pay, just compensation for the taking of property, Medicare compensation, Indian claims, and transportation of persons and property. With the possible exception of the civilian pay cases,¹³ there is no reason to believe such cases will not continue to be the most common types administered by the new Claims Court.

The jurisdictional grant further provides that:

To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.¹⁴

Thus, while the court's general jurisdiction is confined to monetary claims, the relief it may grant on such claims is broader, extending beyond monetary awards. This may be useful where there is a continuing issue, such as whether or not a military officer was wrongfully discharged or retired. If not for the court's incidental authority to require his restoration to duty and correction of his personnel records, the officer would be

¹² *Id.* § 133(a), 28 U.S.C. § 1491(a)(1).

¹³ The Civil Service Reform Act of 1978 provided for a system of appeals to a Merit Systems Protection Board from substantial adverse actions against government civilian personnel. 5 U.S.C. § 7701 (Supp. V 1981). Appeals from a final Board decision were formerly brought to either the Court of Claims or a United States court of appeals. Those appeals formerly brought to the Court of Claims are now subject to the grant of jurisdiction provided to the new Court of Appeals for the Federal Circuit. Federal Courts Improvement Act, § 127(a), 28 U.S.C. § 1295(a)(9). Thus, few if any civilian personnel cases will remain for suit in the Claims Court. Indeed, in *Connolly v. United States*, 554 F. Supp. 1250 (Cl. Ct. 1982), one judge of the Claims Court held that the Civil Service Reform Act provides the only system of judicial review of government civilian employee grievances and therefore the Claims Court has no jurisdiction over such a suit, even if the Merit Systems Protection Board also has no jurisdiction over the particular grievance. *Id.* at 1257-58.

¹⁴ Federal Courts Improvement Act, § 133(a), 28 U.S.C. § 1491(a)(2).

forced to sue for back pay each year. This authority may also be important when a government official rather than the court bears the responsibility of making an initial discretionary judgment or finding of fact. For example, under a contract or statute such a responsibility might be placed on a contracting officer or administrative officer.¹⁵

The Act also grants jurisdiction to the court in some contract disputes:

To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.¹⁶

The House Judiciary Committee report states that the purpose of this measure is to make the government "respect the rule of law" in the award of contracts.¹⁷ The Senate Judiciary Committee's report states its expectation that the court will use its authority in circumstances where awards "would be the result of arbitrary or capricious action by the contracting officials, to deny qualified firms the opportunity to compete fairly for the procurement award."¹⁸ Both committee reports make it clear that the court is not to delay or prevent the award of contracts for goods or services which relate to the national defense or security.

Although the Contract Disputes Act of 1978¹⁹ gave exclusive jurisdiction over government contract litigation to the Court of Claims,²⁰ other courts have asserted jurisdiction to enjoin the award of government contracts to others in violation of the law or regulations even in the absence of specific statutory authority.²¹ It is fair to infer that the delegation of authority in this field to the Claims Court in 1982 was based on the desire to take advantage of the court's expertise in government contract law. However, what Congress meant by "exclusive jurisdiction" remains unclear. A House committee report stated:

The new section 1492(a) does give the new Claims Court the augmented power to grant declaratory judgments and give equitable relief in contract actions prior to award. This enlarged author-

¹⁵ See, e.g., *Fairfield Scientific Corp. v. United States*, 611 F.2d 854 (Ct. Cl. 1979), *appeal dismissed*, 655 F.2d 1062 (1981); *Spokane Tribe of Indians v. United States*, 163 Ct. Cl. 58, 70-71 (1963).

¹⁶ Federal Courts Improvement Act, § 133(a), 28 U.S.C. § 1491(a)(3).

¹⁷ H.R. REP. No. 312, 97th Cong., 1st Sess. 43 (1981).

¹⁸ S. REP. No. 275, 97th Cong., 1st Sess. 23 (1981).

¹⁹ Pub. L. No. 95-563, 92 Stat. 2383 (1972) (codified at 41 U.S.C. §§ 601-613 and scattered sections of titles 16 and 28 U.S.C.).

²⁰ 41 U.S.C. § 601 (Supp. IV 1980).

²¹ See *Merriam v. Kunzig*, 476 F.2d 1233 (3d Cir.), *cert. denied*, 414 U.S. 911 (1973); *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970).

ity is exclusive of the Board of Contract Appeals and not to the exclusion of the district courts. It is not the intent of the Committee to change existing case law as to the ability of parties to proceed in the district court pursuant to the provision of the Administrative Procedure Act in instances of illegal agency action. *See, e.g., Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970). Nor is it the intent of the Committee to oblige lawyers, litigants, and possibly witnesses to travel to Washington, D.C. whenever equitable relief is sought in a contract action prior to award. Although Claims Court judges will travel, they cannot be expected to do so at extremely short notice. Therefore, for the time being, the Committee is satisfied by clothing the Claims Court with enlarged equitable powers not to the exclusion of the district courts. The dual questions of whether these powers should even be broader and of whether they should be exclusive of the district courts will have to wait for a later date.²²

In addition to the grant of jurisdiction under the general statute, the Claims Court has inherited from its predecessor jurisdiction over a number of other matters. The three most significant of these are: (1) a claim for the recovery of reasonable compensation for the unlicensed use or manufacture of an invention or copyright by or for the United States (including a contractor or subcontractor with the authorization and consent of the government);²³ (2) a suit for a declaratory judgment under the Internal Revenue Code²⁴ requesting the redetermination of a ruling by the Commissioner of Internal Revenue with respect to the initial or continuing qualification of an organization as one exempt from income tax or contributions to which are deductible²⁵ and also as a private foundation²⁶ or private operating foundation.²⁷ This jurisdiction is shared with the Tax Court and the United States District Court for the District of Columbia;²⁸

²² H.R. REP. No. 312, 97th Cong., 1st Sess. 43 (1981) (citation omitted). *See, e.g., Opal Mfg. v. UMC Indus.*, 553 F. Supp. 131 (D.D.C. 1982) (court had no jurisdiction to enjoin award of contract by United States Postal Service); *American Dist. Tel. v. Department of Energy*, 555 F. Supp. 1244 (D.D.C. 1983) (court had jurisdiction over post-award suits); *United States v. Grimberg Co.*, 702 F.2d 1362 (Fed. Cir. 1983) (en banc) (Claims Court's exercise of equitable power is limited to cases in which complaints are filed in the Claims Court before contract is awarded). *F. Alderete Gen. Contractors, Inc. v. United States*, No. 83-1003 (Fed. Cir. Aug. 23, 1983) (Claims Court has equitable power to enjoin contracts already awarded if suit is initially brought before award).

²³ 28 U.S.C. § 1498(a) (1982).

²⁴ I.R.C. § 7428 (1976).

²⁵ *Id.* § 501(c)(3). This section includes as tax exempt organizations those corporations and community foundations organized solely for religious, charitable, scientific, literary, or educational purposes. *See id.* § 170(c)(2).

²⁶ *Id.* § 509(a).

²⁷ *Id.* § 4942(j)(3).

²⁸ 28 U.S.C. § 1507 (1982).

(3) a suit brought pursuant to a bill referred by either branch of Congress for a report sufficient to inform Congress of the amount, if any, legally or equitably due from the United States to the claimant.²⁹

Other important types of matters over which the Claims Court has jurisdiction include Indian claims accruing after August 13, 1946, claims arising under the Constitution, laws or treaties of the United States, or executive orders of the President,³⁰ claims accruing before 1946 which were pending before the Indian Claims Commission upon its dissolution in 1978,³¹ and claims for recovery of the cost of removal of oil and other hazardous substances from navigable waters of the United States when the claimant is wholly without responsibility for the discharge.³²

Although the primary (but not exclusive) focus is on claims against the government, the court's jurisdiction allows not only a set-off against a claim,³³ but also a counterclaim against the plaintiff in excess of the amount of the claim.³⁴ The judgment on the counterclaim is filed in the clerk's office of any district court and is enforceable as any other judgment is.³⁵ Furthermore, the Comptroller General may transmit to the court any claim or matter over which the court might assume jurisdiction on the voluntary action of the claimant. The court is required to proceed with such a claim or matter and render judgment on it.³⁶

²⁹ *Id.* §§ 1492, 2509. Since 1966 this jurisdiction had been lodged in the commissioners of the Court of Claims and not in the court itself. This anomaly derived from the decision in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), stating that the conduct of congressional reference cases, a legislative advisory function, is incompatible with the independence of article III judges under the Constitution, and the Court of Claims should therefore respectfully decline to handle such matters. *Id.* at 582. In 1966 Congress delegated such functions to the Court of Claims commissioners. Judiciary and Judicial Procedure Act of 1966, Pub. L. No. 89-681, §§ 1-2, 80 Stat. 958, 958 (amending 28 U.S.C. §§ 1492, 2509 (1964)). As discussed in the text, *infra*, the Claims Court is not an article III court.

³⁰ 28 U.S.C. § 1505 (1982).

³¹ 25 U.S.C. § 70n, s (1976).

³² 33 U.S.C. § 1321(i) (1976). There are other types of claims over which the court has jurisdiction but which arose infrequently in the predecessor court. *See* 28 U.S.C. § 1494 (1982) (petition for an amount due to or from the United States by reason of an unsettled account of an officer, agent or contractor); *Id.* § 1495 (claim for damages by a person imprisoned due to an unjust conviction); *Id.* § 1496 (claim by a disbursing officer for relief from responsibility for loss, in the line of duty, of government funds or records); *Id.* § 1497 (claim by an oyster grower on private or leased lands for damages from dredging and similar operations); *Id.* § 1499 (claim for liquidated damages withheld from a contractor or subcontractor).

³³ 28 U.S.C. § 1503 (1982).

³⁴ *Id.* § 2508.

³⁵ *Id.*

³⁶ *Id.* § 2510.

III. CLAIMS COURT PROCEDURE

A. *Decision by a Single Judge*

The Federal Courts Improvement Act provides that the judicial power of the Claims Court, except with respect to congressional reference cases, shall be exercised by a single judge, who may preside alone.³⁷ Again, except with respect to congressional reference cases, there is no provision for review of a decision by any other judge or panel of judges within the court. This procedure is similar to that in the federal district courts.

A congressional reference case is decided initially by a single judge, but since his decision is not appealable to any other court, it is reviewed by a panel of three other Claims Court judges designated in each case by the chief judge of the court when the case is filed.³⁸

B. *Assignment of Cases*

In the Court of Claims, patent law cases were ordinarily assigned to the two trial judges who had specialized in the field of patent law. Similarly, the more complex tax cases were assigned to those judges with experience in the field. This specialization at the trial level was offset by the fact that the assignment of judges by areas of specialization was not followed at the appellate level. Ordinarily the panels of judges were randomly selected.

The Claims Court has adopted a practice of random assignments with some modifications. A rule provides:

(1) After the complaint has been served on the United States, or after recusal or disqualification of a judge to whom a case has been assigned, the case shall be assigned forthwith to a judge on the basis of random selection by the clerk, except that related cases shall be assigned to the judge who has been assigned the earliest case filed. With the consent of the judge to whom a case has been assigned, the chief judge may reassign any case if he deems such action necessary for the efficient administration of justice.³⁹

The rule further provides that at the time the action is filed, or as soon as known thereafter, the plaintiff's attorney is to file and serve on all parties a notice of cases related by transactions, events, or questions, or otherwise likely to entail substantial duplication of labor if heard by different judges.⁴⁰

Although the principle of random assignment governs generally, the

³⁷ Federal Courts Improvement Act, § 105(a), 28 U.S.C. § 174(a).

³⁸ *Id.* § 139(b)(2), 28 U.S.C. § 2509(a).

³⁹ Cl. Ct. R. 77(f).

⁴⁰ *Id.*

rules recognize that in practice it is impossible to maintain the principle absolutely. This is because some cases are interrelated, while others involve the same issue of law or the same mixed issues of law and fact. Also, a judge may be occupied with the resolution of complex cases, making it difficult to hear or decide cases which have been pending for some time. A case may require a trial in an area distant from Washington, D.C., although the judge to whom it is assigned has no other cases at that location, while another judge may already have a docket of cases in the area and can readily add another. For these and other reasons relating to the efficient administration of justice, the rules provide that a judge may ask for reassignment of one of his cases to another judge.

C. Place of Trial and Pretrial Proceedings

The Claims Court is a national court. The Act provides that “[h]earings shall, if convenient, be held in the counties where the witnesses reside.”⁴¹ Most frequently this results in the trial being held in the county where the plaintiff resides. However, this is not always practical. There may be a number of witnesses residing in different counties, and a location which is closest to the majority may be the most convenient. On the other hand, if the case warrants it, it may be most desirable to conduct the trial at more than one location. Other practical considerations may also dictate the location: for example, a courtroom may not be available for trial in the county of the plaintiff’s residence on the date the parties have agreed on for trial; or the case may not be large or important enough to warrant the judge making a separate trip to try it alone, but he may be able to fit it in as part of a docket of cases to be tried in another nearby location.

Pretrial conferences are usually held in Washington, D.C. But if the amount in controversy or the significance of the issue does not warrant requiring plaintiff’s counsel to incur the cost of an additional trip to Washington, D.C., the judge may conduct such a conference by telephone.

D. Rules of Evidence

As in other federal courts, the proceedings are required to be conducted in accordance with the Federal Rules of Evidence.⁴²

E. Rules of Practice and Procedure

The Claims Court is not *required* to follow the Federal Rules of Civil Procedure. The Act provides that the proceedings of the Claims Court shall be “in accordance with such rules of practice and procedure as the Claims Court may prescribe.”⁴³ To the extent deemed feasible, the rules

⁴¹ Federal Courts Improvement Act, § 139(b)(1), 28 U.S.C. § 2503(c).

⁴² *Id.* § 139(b)(1), 28 U.S.C. § 2503(b).

⁴³ *Id.*

adopted October 1, 1982, follow the Federal Rules, while also reflecting the differences in jurisdiction. Reflective of these differences is the absence from the Claims Court rules of rules on counterclaims against the United States, cross-claims and joinder of additional parties, seizure of persons or property, execution, judgments for specific performance, process against persons not parties and condemnation of property. There are also differences in the rules on class actions, substitution of parties, depositions, production of documents, and failure to make or cooperate in discovery. In addition, the rules serve a function similar to that of the local rules of a federal district court. They deal with remands to administrative or executive bodies or officials, case management, contents of briefs, time requirements, transfers from other courts, and referrals from the Comptroller General.

F. Pretrial Procedures

Prior to the Claims Court era, the Trial Division of the Court of Claims developed a full system of pretrial orders and submissions. Although each judge was free to use, modify or abandon the pretrial procedures, the procedures proved useful in refining the issues of law and fact and in avoiding unnecessary discovery. The hope is that most Claims Court judges will continue to use them. The standard pretrial order on liability requires the plaintiff to submit the following statements to the defendant and to the trial judge within a specified period of time (e.g. sixty days): a list of his proposed exhibits (together with a copy of each exhibit to the defendant), a statement of the facts he believes to be uncontested, a statement of his contentions of fact and law, the names and addresses of all witnesses and the subject of their testimony, plaintiff's estimated trial time and preferred place of trial. Within a similar period thereafter the defendant is required to make its submission. In this submission defendant is first required either to concede the admissibility of each of plaintiff's proposed exhibits or to state the reason for objection thereto, and to admit or deny plaintiff's statements of uncontested facts. In addition, defendant must submit to plaintiff and to the trial judge its list of exhibits (with copies to plaintiffs), uncontested statements of fact, contentions of fact and law, list of witnesses and their testimony, and defendant's estimate of its trial time and preferred trial location. Plaintiff is then required to respond to defendant's submissions. Similar standard pretrial orders have been developed for purposes of determining damages and for accounting, if the liability and damage issues were initially bifurcated.

In the majority of cases, particularly tax cases, the plaintiff, having brought the suit, knows the facts necessary to establish a *prima facie* case on liability and does not require discovery in order to make his initial pretrial submission. The defendant, however, may need discovery to verify plaintiff's exhibits, statements of fact and proposed testimony. If so, it may be necessary to allow defendant a reasonable extension of time for

discovery before requiring it to make its submission. Similarly, plaintiff may need reasonable additional time to check on exhibits and statements in defendant's submissions before making his reply.

After a suitable interval of time, the judge schedules a pretrial conference. If the case is sufficiently large or important, the conference is held in Washington, D.C.; otherwise it is conducted by telephone conference call. Some judges insist that the conference be held in open court with a court reporter present. Ordinarily, the author's preference is that the conference be conducted in chambers in a more informal and cooperative atmosphere. The first order of business may be the admission of the exhibits which have been conceded as admissible and of those exhibits which are ruled to be admissible despite objection. Other exhibits are merely marked for identification. Second, the parties are asked to prepare a stipulation of the facts not in dispute, or, if it appears that some controversy may develop, the judge may place such facts in evidence in his pretrial order. Third, if further discovery is required, its nature is discussed, objections may be ruled upon, and a deadline may be set for it. Fourth, if it appears that some or all of the issues may be disposed of as a matter of law, one or both of the parties is ordered to file a motion for summary judgment and a schedule is set for briefs. Fifth, if the parties propose to rely on expert testimony, a schedule is set for exchange of the witnesses' reports. Sixth, the likelihood of compromise is explored. Seventh, the probable length and place of trial are discussed. Eighth, the date of trial is set giving consideration to the time needed for completion of discovery, completion of expert witnesses' reports, and consideration of offers in compromise. Ninth, a pretrial order is prepared, setting forth all of the agreements, determinations, and orders arrived at in the conference.

The use of the pretrial procedures has many advantages. It promotes trial preparation pursuant to a court-set schedule, delineates the issues, informs the court as to the nature of the issues, and enables the court to determine whether the issues in dispute are of law or of fact and whether they may be disposed of by motion. If a trial is to be held, pretrial procedures enable prior determination of whether or not the issue of liability should be tried separately from the issue of damages. Furthermore, the pretrial procedures tend to limit the parties to discovery only in pertinent and productive channels, enables the court to rule on discovery disputes on a better informed basis, and encourages the parties to agree on informal methods of discovery so as to expedite compliance with the standard pretrial order deadlines. By requiring discussions between counsel and mutual disclosure of facts and contentions informed compromise is promoted. If trial is necessary, pretrial procedures shorten its length by focusing only on facts in dispute.

G. Discovery

The Court of Claims rules allowed parties to use the same discovery

devices as had been available under the Federal Rules of Civil Procedure—interrogatories to parties, requests for production of documents, requests for admission, and oral and written depositions. The biggest difference was that in the Court of Claims, but not in the district courts, absent a stipulation, the court's permission was required to invoke the discovery procedures (other than interrogatories). Permission was obtained by motion showing good cause. The Claims Court rules now parallel those of the federal district courts, to the extent possible under the law. The last qualification must be inserted because the district court rules permit a party taking a deposition to invoke the aid of another district court in the district where the deposition is being taken to order a non-party deponent to respond.⁴⁴ No similar procedure is available for a Claims Court deposition. Another difference is that a federal district court may hold a non-party deponent in contempt for failure to obey an order to answer a question.⁴⁵ No statute directly gives the contempt power to the Claims Court.

H. Trial

Claims Court trials are conducted in much the same way as suits involving the United States are in the federal district courts. There are some significant differences in the incidents of trial, however. First, in a district court the government is usually represented by the United States Attorney for the same district, although he may be assisted by an attorney from the Department of Justice or some other government agency. In the Claims Court the government is almost always represented by an attorney from the Tax, Civil or Land and Natural Resources Division of the Department of Justice from Washington, D.C., regardless of where the trial is conducted. Second, a Claims Court trial is more likely to use entirely live testimony than a district court trial is. The parties to the latter are often forced to rely on depositions as a part of their own cases. This is because a district court's subpoena power in civil cases is ordinarily limited geographically to the particular district, or to a place within 100 miles of the place of trial, or, in some instances, the state of trial.⁴⁶ In a district court case, should a witness outside the trial subpoena limits refuse to attend trial or to produce pertinent records voluntarily, depositions must be relied on. On the other hand, the Claims Court subpoena is not similarly limited geographically;⁴⁷ because the court is a national one whose judges may sit anywhere in the United States where the witnesses reside, a Claims Court trial is more likely to be conducted with live testimony. A third difference is that portions of a Claims Court trial may be

⁴⁴ FED. R. CIV. P. 37(a)(1).

⁴⁵ *Id.* 37(b).

⁴⁶ *Id.* 45(e)(1).

⁴⁷ 28 U.S.C. § 2521 (1982).

conducted in more than one federal district at different times, to suit the availability of witnesses, counsel and the judge. Fourth, in the old Court of Claims it was common practice to separate the issues of liability and damages, with the liability issue to be tried first. The Trial Division's decision on liability was appealable to the court, and, therefore, there was a final decision on liability before the issue of damages was tried. Although a determination on liability by the new Claims Court is not a final judgment and hence may not be appealed to the Court of Appeals before the amount of the judgment is determined, it appears likely that the Claims Court judges will, for the most part, continue such separation of issues. This separation promotes judicial efficiency because, if there is no liability, difficult accounting and other quantum issues need never be reached. Furthermore, once the government has been found liable, the parties frequently stipulate the dollar effect thereof. Last, the court furnishes a court reporter for each trial conducted in the United States, and a transcript of the testimony is furnished to the court and to counsel who wishes to pay for a copy. Proposed findings and briefs may then be argued on the basis of record references. This enables more precise use of the record, both by the parties and by the court. The flexibility which characterizes the trial procedures described above is a factor which has encouraged litigants to bring more complex tax cases in the Court of Claims and new Claims Court even though equivalent jurisdiction has also been available in the district courts.⁴⁸

I. Post-Trial Procedures

The Court of Claims rules provided that, unless otherwise ordered by the trial judge, the court reporter was to file the transcript of the trial proceedings, including the exhibits, with the clerk within thirty days after the conclusion of the trial session.⁴⁹ Thereafter, the trial judge filed an order with the clerk, declaring that the proof had been closed.⁵⁰ Unless otherwise ordered by the trial judge, the plaintiff then had thirty days in which to file requested findings of fact and a brief on the questions of law; the defendant then had thirty days within which to file his requested findings, objections to plaintiff's findings and brief; plaintiff then had twenty days to file his objections and reply brief.⁵¹

⁴⁸ As of September 30, 1981, there were 2,677 tax refund suits, aggregating some \$546,005,000, pending in the district courts, courts of appeal, and the Supreme Court. See 1981 I.R.S. ANN. REP. 77. The comparable figures for the Court of Claims were 837 suits, aggregating \$649,433,000. *Id.* Thus the average dollar amount per district court suit was \$203,961, and \$775,905 per Court of Claims suit. *Id.* The comparisons for prior years have been similar, and there is no reason to believe that the Claims Court experience will be different.

⁴⁹ Ct. Cl. R. 122(d) (28 U.S.C. app. (1976)).

⁵⁰ *Id.* 134(a).

⁵¹ *Id.* 134(c)(1)-(3). Although the same rule authorized the trial judge to direct concurrent

Requested findings were required to be in the form of distinctly numbered propositions of fact, and both findings and objections were to be supported by citations to the record.⁵² The trial judge's decision on the merits then set out in separate parts his findings of fact and his opinion and recommended conclusion of law.⁵³

The Claims Court rules continue to provide that the court reporter is to file the transcript of trial proceedings and exhibits with the clerk within thirty days after conclusion of the trial session.⁵⁴ However, the post-trial proceedings thereafter are not prescribed by the Claims Court rules. Each judge sets his own requirements as to findings, briefs, and time for filing in each case.

The Claims Court rules provide that the court shall find the facts specifically and state separately its conclusions of law.⁵⁵ But they also state that requests for findings are not necessary for purposes of review, and that if an opinion or memorandum of decision is filed it will be sufficient if the findings of fact and conclusions of law appear therein.⁵⁶

Regardless of whether or not they are required, astute counsel will most likely continue to submit proposed findings in the form of distinctly numbered propositions of fact, supported by citations to the record, and specific objections to his opponent's findings similarly supported. This method remains the most efficient one by which to argue the facts.

J. Oral Argument

One Claims Court rule provides that "[t]he judge may determine motions and cases on the merits without oral argument upon written statement of reasons in support and opposition."⁵⁷ It further provides that "[a]ll conferences, oral argument, trials and other appearances shall be scheduled by the judge by order filed with the clerk."⁵⁸ By statute the rules applicable to review panels in congressional reference cases must include provision for submitting the report of the hearing officer to the parties "for consideration, exception and argument before the panel."⁵⁹ Pursuant to that mandate, the congressional reference case rules relating to oral argument state that the presiding officer of the review panel in each case shall establish a schedule for the parties to file requests for oral argument.⁶⁰ Neither the statutes nor the rules require the hearing of oral

filing of requested findings and briefs, seriatim filing was the more common procedure.

⁵² *Id.* 134(d)(1).

⁵³ *Id.* 134(h).

⁵⁴ CL. CT. R. 39(b)(3).

⁵⁵ *Id.* 52(a). This rule is identical to FED. R. CIV. P. 52(a).

⁵⁶ CL. CT. R. 52(a).

⁵⁷ *Id.* 77.1(a).

⁵⁸ *Id.* 77.1(b).

⁵⁹ 28 U.S.C. § 2509(d) (1982).

⁶⁰ CL. CT. R. app. D § 10.

arguments on every case, or any class of cases, or on any briefs or motions. Any party who deems it important should request oral argument by motion. Even if no party requests it, the judge may nevertheless order oral argument if he believes it will assist him.

Since the court has nationwide jurisdiction, many plaintiffs and their attorneys are located at a considerable distance from Washington, D.C. If a case is not large enough to warrant the expense of an additional trip to Washington, the party should consider the possibility of requesting oral argument by telephone. Each judge has had installed a telephone with conference capability and a speaker phone, to enable oral argument in this form.

IV. APPEALS

An appeal from a final decision of the Claims Court is exclusively within the jurisdiction of the Court of Appeals for the Federal Circuit.⁶¹ Such an appeal is initiated by filing a notice of appeal with the clerk of the Claims Court within the time and in the manner generally prescribed for appeals to United States courts of appeals from United States district courts.⁶²

Prior to the changeover, the standard of review for decisions of the trial division of the Court of Claims was unclear. The Court of Claims rules provided that "[d]ue regard shall be given to the circumstance that the trial judge had the opportunity to evaluate the credibility of the witnesses; and the findings of fact made by the trial judge shall be presumed to be correct."⁶³ But the same rule also provided that "[t]he court may adopt the trial judge's report . . . or may modify it, or reject it in whole or in part. . . ."⁶⁴ In its decisions the court took the view that since only the appellate judges had the statutory responsibility for deciding the cases, it could disregard the trial judges' findings and find the facts itself.⁶⁵

The role of the trial judges as a separate court with the authority to enter judgment unquestionably changes the posture of the cases on review. Rule 52(a) of the Federal Rules provides that "[f]indings of fact [of district courts] shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the

⁶¹ Federal Courts Improvement Act, § 127(a), 28 U.S.C. § 1295(a)(3).

⁶² *Id.* § 139(q)(1), 28 U.S.C. § 2522.

⁶³ Ct. Cl. R. 147(b) (28 U.S.C. app. (1976)).

⁶⁴ *Id.*

⁶⁵ See, e.g., *Righter v. United States*, 439 F.2d 1204 (Ct.Cl. 1971) (court makes own findings in valuation case by considering all the evidence rather than merely weighing the correctness of trial commissioner's findings); *Bringwald, Inc. v. United States*, 334 F.2d 639 (Ct. Cl. 1964) (court has ultimate responsibility for determining findings and opinions and is not limited to the "clearly erroneous" standard).

credibility of the witnesses.”⁶⁶ The “clearly erroneous” standard of review has been defined by the Supreme Court⁶⁷ and it is expected that the Court of Appeals for the Federal Circuit will follow that standard in reviewing Claims Court findings. However, as of this writing no decision has yet been issued by the Court of Appeals which clearly defines the standard of review of a Claims Court decision.⁶⁸

Review of interlocutory decisions and orders of the Claims Court is also available but on a much more limited basis than was review of decisions and orders of the trial judges of the Court of Claims. Court of Claims Rule 53(c)⁶⁹ allowed a party dissatisfied with a non-dispositive order of a trial judge to request interlocutory review within ten days⁷⁰ after its issuance in two situations: (1) when the trial judge stated in his order that it involved “an issue of controlling importance or an issue of deprivation of fundamental rights as to which there [was] substantial ground for difference of opinion and that the ultimate termination of the litigation [might] be materially advanced by permitting interlocutory review”;⁷¹ or (2) when the requesting party made a “showing of extraordinary circumstances whereby further proceedings pursuant to said order would irreparably injure the complaining party or occasion a manifest waste of the resources of the court or of the parties.”⁷² The Act now allows the Court of Appeals in its discretion to permit an appeal from an interlocutory order of the Claims Court only when the judge states in the order that “a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation.”⁷³ The Act is obviously more restrictive than was the rule for the following reasons: permission for the appeal is in the discretion of the Court of Appeals; the trial judge *must* make the qualifying statement; the controlling question must be one of law; and there is no provision for

⁶⁶ FED. R. CIV. P. 52(a).

⁶⁷ See *Commissioner v. Duberstein*, 363 U.S. 278 (1960): “A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Id.* at 291 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). This rule also applies to factual inferences from undisputed basic facts. *Id.*

⁶⁸ But see *Baginski v. United States*, 697 F.2d 1070 (Fed. Cir. 1983). The *Baginski* court made its own findings on an issue in a case where the normal practice would have been to remand the case to the trial judge because “the record leaves no question as to the decision that must result from a remand.” *Id.* at 1074. Judge Kashiwa dissented, in part, on the ground that “this court and the Claims Court are not a single court with both original and appellate jurisdiction, as was . . . the Court of Claims.” *Id.* at 1077.

⁶⁹ CT. CL. R. 53(c)(2) (28 U.S.C. app. (1976)).

⁷⁰ *Id.* 53(c)(3).

⁷¹ *Id.* 53(c)(2)(i).

⁷² *Id.* 53(c)(2)(ii).

⁷³ Federal Courts Improvement Act, § 125(b), 28 U.S.C. § 1292(d)(2).

review of an order involving an issue of deprivation of fundamental rights. Furthermore, there is no stay of the trial proceedings unless ordered by the trial court.

Restriction of review to a "controlling question of law" will in most cases prevent review of liability determinations in complex cases where the issues of liability and damages have been severed for separate trial, even where the trial or the damages issue may be burdensome and expensive.

Review of the decision of a trial judge in a congressional reference case is by a panel of three other Claims Court judges, designated in each case by the chief judge of the court, rather than by the Court of Appeals for the Federal Circuit.⁷⁴ Appeals are taken by a timely filing of exceptions to particular findings and conclusions of the hearing judge, rather than by a general notice of appeal.⁷⁵

V. IMPROVEMENTS AND SHORTCOMINGS IN THE EFFICIENT ADMINISTRATION OF JUSTICE STEMMING FROM THE FEDERAL COURTS IMPROVEMENT ACT OF 1982⁷⁶

It is evident from the committee reports and the entire legislative history of the Federal Courts Improvement Act that the creation of the Court of Appeals for the Federal Circuit from the Court of Claims and the Court of Customs and Patent Appeals was the primary aim of the legislation; equally clear is that the transfer of the non-appellate functions of the Court of Claims to the new Claims Court was a necessary but less important incident thereof.⁷⁷ Therefore, in evaluating the effect of the Act on the efficient administration of justice resulting from the transfer of trial functions to the Claims Court, one must consider in the balance the positive effect of the formation of the Court of Appeals for the Federal Circuit and its new consolidated appellate jurisdiction over patent infringement cases and other patent cases, which is not weighed herein.

The most important improvement at the trial level is the ability of the trial judge to enter a final judgment. A trial judge of the Court of Claims was only able to recommend a decision to such court, and there was no final judgment until the appellate judges reviewed the recommendation, even where no exception was taken by either party. This frequently re-

⁷⁴ *Id.* § 139(h)(1), 28 U.S.C. § 2509(a).

⁷⁵ CL. CT. R. app. D.

⁷⁶ See *supra* notes 16, 17. See also *Court of Appeals for the Federal Circuit—1981: Hearings on H.R. 245 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981).

⁷⁷ Those interested in decisions of the Claims Court may find a West publication, the *United States Claims Court Reporter*, useful. The series contains cases decided by the Claims Court as well as decisions of the Court of Appeals for the Federal Circuit.

sulted in several months of delay in the payment of a judgment. Now judgment is entered immediately by the clerk when the decision of the Claims Court judge is filed.

In addition, a Claims Court judge has considerably greater flexibility than his predecessor had in the trial division of the Court of Claims. Formerly, if a party filed a motion for summary judgment or other dispositive motion in the Court of Claims, the trial judge's jurisdiction of the case was suspended until the motion was decided by the court. This determination could result in several months of delay. A Claims Court judge, in contrast, may now examine the moving papers to see if there is substance to the motion, and, if not, may deny the motion summarily. Furthermore, the filing of the motion no longer automatically suspends the pretrial preparations and the judge may insist that such preparations go forward.

Equally important is the fact that, as members of a separate court authorized to enter final judgments, the judges of the Claims Court have been able to shorten decision time by applying a greater measure of flexibility in their procedures than their predecessors could apply in the Court of Claims. In simple and clear-cut cases, judges have been issuing orders in lieu of lengthy opinions, and they have been able to eliminate separate formal findings by incorporating the findings in their opinions.

On the other hand, the Act has created new problems at the trial level which did not exist in the Court of Claims.

In the Court of Claims, a case which involved only questions of law which could be fully stipulated or which could be decided on motion for summary judgment, bypassed the trial division and was decided directly by the appellate division, necessitating only one set of briefs. Now the Claims Court must decide every such case first, and, if it is appealed, the Court of Appeals for the Federal Circuit must decide the same legal question. Therefore two sets of briefs are required and final disposition may take longer.

At least half of the cases in the old Court of Claims turned on questions of law, which proceeded directly to the appellate division for decision. Since all cases now begin in the trial court, the judges of the Claims Court have more cases to decide. To keep up with their caseloads, judges may have to introduce short-cuts, such as disposing of more cases by order and fewer by opinion.

Since the appellate judges of the Court of Claims reviewed all varieties of cases within its jurisdiction, it was feasible to have the trial judges specialize and to assign cases on the basis of judicial expertise. The Claims Court judges considered it inappropriate to divide the single unified court into specialized segments, and therefore they adopted generally random assignment. Thus, to some degree, there may be a loss of expertise.

The new court legislation fails to give the Claims Court specific contempt authority. This raises questions as to how the court can enforce its

subpoenas to non-party witnesses and its subpoenas for the production of documents.

The section granting new jurisdiction to the Claims Court to decide protests by unsuccessful bidders on government contracts provides that "[i]n exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security."⁷⁸ This evidently means that priority should be given to such cases. It is difficult to assess how many such cases will be brought, but they may well detract from the ability of the Claims Court to give prompt attention to other cases.

A question may arise in the minds of some members of the bar as to the independence of the Claims Court judges compared to district court judges. The trial judges are carried over during the transitional period to fifteen-year terms computed retroactively from their original appointments but not later than September 30, 1986. The judges appointed by the President serve for fifteen-year terms. Unlike Tax Court judges, those not reappointed are not entitled to automatic retirement benefits. Thus, the judges have no greater job security than any other government employees, and in some ways less. It is obviously undesirable that judges called upon to decide cases in which the Department of Justice represents one party must simultaneously solicit the favorable recommendation of the same Department of Justice for reappointment.

⁷⁸ Federal Courts Improvement Act, § 133(a), 28 U.S.C. § 1491(a)(3).